Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DWAIN L. CADDELL, INDIVIDUALLY & AS INDEPENDENT EXECUTOR OF THE ESTATE OF ALTA B. CADDELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

STEVEN GREGORY WHITE
McGREGOR & WHITE
P.O. Box 1818
Waco, Texas 76705
(254) 756-4427

Attorneys for Petitioner

180845

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Claims against the United States are governed by a 6 year statute of limitations set out in 28 U.S.C. § 2401. When that statute is interposed by the United States to bar a plaintiff's claims, some courts hold that the statute limits the jurisdiction of the federal courts; others hold that the statute merely provides the government a defense. Whether the statute is jurisdictional or defensive has a critical impact on the rule for decision, and the courts below erred in deciding that the statute was jurisdictional.

LIST OF INTERESTED PARTIES

Terri K. Trevino, a Nominal Party on the Appellee's side of the case, named because of her status as Trustee under a Deed of Trust, has no interest in this appeal.

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Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed February 17, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Texas, Waco Division Dated And Filed March 15, 2002 ..... 4a

Dwain Caddell, Individually and as Independent Executor of the Estate of Alta B. Caddell, files this Petition for Writ of Certiorari. The Petitioners will be jointly referred to as "Caddell". The Respondents will be referred to as "The United States" or "The Government".

OPINIONS BELOW

The United States District Court decided the case by unpublished written order (Appendix B). The Fifth Circuit Court of Appeals issued an opinion that was not published under 5th Cir. R. 47.5. (Appendix A).

STATEMENT OF JURISDICTION

The District Court dismissed the case under Rule 12(b)(1), Fed. R. Civ. P., finding it had no subject matter jurisdiction and entered a final judgment. Caddell appealed that decision to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291 because it was an appeal from a final judgment. The Court of Appeals entered its decision on February 17, 2003.

Jurisdiction of the Court is founded on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

§ 2401. Time for commencing action against United States

> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the

> complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT OF THE CASE

(a) Course of Proceeding & Disposition of the Case Below

This case began in State Court in Falls County, Texas. Caddell sought a Temporary Injunction from the State Court to halt non-judicial foreclosure proceedings begun by the Farm Service Agency (formerly the Farmers Home Administration) (R. 5). The United States removed the case (R. 1), and then filed a Motion to Dismiss. (R. 44).[1] The Motion to Dismiss claimed that the District Court lacked subject matter jurisdiction over the case because the case was filed more than six (6) years of the date that the claim accrued. (R. 44-48; 148-150).

Caddell responded to the Motion to Dismiss, contesting the argument that the claim accrued more than 6 years prior to suit. (R. 69-127). The District Court determined the jurisdictional issue by deciding that Caddell had waited too long to sue, and dismissed the case. (R. 165-169, Appendix B). A final judgment was entered in accordance with the order of dismissal on March 15, 2002. (R. 170).

---

1. After the Motion to Dismiss was directed to Caddell's state court pleadings, Caddell sought and received permission to Amend. (R. 158-164, 165-169). The United States renewed its Motion to Dismiss as to the Amended Complaint. (R. 148-150), but no new issues were raised by either side in these pleadings.

On March 27th, Caddell filed a Motion for New Trial (R. 171-176), and that Motion was denied on April 11, 2002. (R. 185).

Caddell then appealed to the Fifth Circuit Court of Appeals. (R. 186-187). On February 17, 2003, the Fifth Circuit affirmed the judgment of the District Court in an unpublished opinion (Appendix A).

(b) Statement of Facts

Caddell and his family owned approximately 1545 acres of land in Falls County and Limestone County in Texas. (R. 44). Of the 1545, 400 acres were designated as rural homestead – the maximum permitted by Texas law. Under the Texas Constitution, the designation of homestead protects the property from any lien other than for purchase money, taxes and valid liens for improvements (none of which are at issue here).[2]

In 1975, Caddell had borrowed money against part of the 1545 acres, but had apparently excluded any claim to the 400 homestead acres from the real estate liens. (R. 45). However, by 1977, Caddell got into financial difficulty and conveyed all of the acreage to his lender in lieu of foreclosure. Even though the lender claimed no lien on the 400 acres of homestead property, the deed in lieu of foreclosure included the homestead land. (R. 6; 79). Caddell then obtained

2. In other words, this case is not about whether there is a valid purpose for the money loaned by the government so that a lien could be impressed on the land. At this point in the litigation, the parties have not even joined issue on why the Government claims a valid lien. The only issue at present is whether Caddell is entitled to contest a claimed lien.

alternative financing from a private individual and repurchased his land from the Bank about 30 days after the deed in lieu of foreclosure. He got back the 400 acres of homestead land in this transaction. (R. 7; 79-80).

In 1978, the Farmers Home Administration loaned Caddell enough money to pay off the private financing, and obtained the same liens that the private financier had obtained. (R. 7-8; 46; 79-80). The Government asserted a default on these loans in 1982, and a series of proceedings began that has resulted in the instant dispute.

In 1982, the Government tried to foreclose, but not against the 400 acres designated as homestead. (R. 81). Caddell filed a bankruptcy case under Chapter 11. In 1984, the Government filed a Proof of Claim in the Bankruptcy case asserting a lien based on its paperwork. (R. 131). This claim was not decided until 1987, when the Bankruptcy Court effectively approved the claim (R. 145-146). This Order did not come close to resolving the issue. From 1990 to 1996, the Government assured Caddell that it was *not* claiming a lien on the 400 acres of homestead property (R. 80-81), and provided letters and statements to that effect. (R. 92-98; 118-127). There is no document after 1987, and none authored or sponsored by the Government where the United States says, without reservation, that it claims a lien on the 400 acres of homestead property. All of the documents are equivocal until 2001 – when Caddell was served with foreclosure papers. This suit was filed immediately after the foreclosure was begun. (R. 80-81).

REASONS FOR GRANTING THE WRIT

The District Court decided this case on a challenge to its subject matter jurisdiction. The basis of the challenge to jurisdiction was that Caddell waited too long to file suit, and was therefore time barred. When a plaintiff is time barred in suit against the Government, the limitations period is jurisdictional (according to the District Court in this case). But, that ruling was in error. A statute of limitations, even one that runs in favor of the United States is simply a defense to a claim. So, it must be asserted and proven as any other affirmative defense.

This means that a simple assertion in a Motion to Dismiss under Rule 12(b)(1) is rarely sufficient. Only when the plaintiff pleads himself out of court would the dismissal on pleadings be appropriate. The proper means to determine whether a suit is time barred is to consider the matter in a Motion for Summary Judgment filed under Rule 56 Fed. R. Civ. P., or at least to consider the case under the standards recognized under Rule 12(b)(6). The Plaintiff then has the opportunity (and the obligation) to provide sufficient allegations (under Rule 12) or sufficient proof (under Rule 56) to raise a genuine issue of material fact that would defeat the operation of a limitations statute.

Caddell was, in this case, deprived of substantial procedural protections by the summary dismissal of his case under an erroneous standard for decision. The limitations period was not jurisdictional and the District Court was not authorized to be the "finder of fact" on the application of limitations. Instead, the District Court was only authorized to determine whether there were disputed issues of fact after notice to all parties that this determination was ripe for decision.

Caddell provided the District Court with substantial information that would dispute the application of the limitations period as a bar to his suit. Instead of recognizing these facts as disputed and authorizing discovery and a trial on the facts, the District Court took a short-cut and simply dismissed Caddell's case. This was error warranting a new trial.

There are two parts to the Government's argument in this case. First, the Government argues that the District Court was entitled to make a factual finding about the date upon which Caddell had notice of his claim. Second, the government claims that since Caddell knew of his claim more than six (6) years prior to suit, there can be no excuse for failing to file within the six-year period proscribed by 28 U.S.C. § 2401(a) – precluding an application of equitable tolling of the limitations period.

Section 2401(a) is a very "traditional" statute of limitations. It simply provides:

> § 2401. Time for commencing action against United States
>
> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

The language of the statute is critical because the Government insists that this language makes the limitations period jurisdictional, and not merely a defensive issue. The Government's argument is that the United States has sovereign immunity, and that any waiver of that immunity may be accomplished with certain conditions. Those conditions, including time limits for bringing claims, are a part of the jurisdiction of the courts to decide cases.

Indeed, cases can be found that conclude that a waiver of sovereign immunity may be conditional, and that the jurisdiction of the courts is limited to those conditions. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Orleans*, 425 U.S. 807, 814 (1976).

This is the rationale upon which the courts below determined Caddell's case. (Appendix 2a, 9a). But, the determination that its jurisdiction dependant upon a determination of the timeliness of suit is wrong. The District Court had jurisdiction, and should have decided the timeliness issue as it would any other defensive issue.

I.

IS TIMELINESS JURISDICTIONAL?

There has been consistent disagreement in the last ten years about the effect of a statute of limitations that runs in favor of the government as a defendant. Two opposing considerations set the parameters of the disagreement. Courts often held that statutes that waive the government's immunity were to be strictly construed, and unless the specific statute granted some exception to a specific time limit for suit, there was no reason to permit suits beyond the limitations period

(no matter the equitable concerns for tolling limitations). *See Hart v. United States*, 585 F.2d 1280 (5th Cir. 1978).[3]

In this case, the United States relied on *Nesovic v. United States*, 71 F.3d 776 (9th Cir. 1995). There the Ninth Circuit held:

> The applicable statute of limitations is a term of consent. The failure to sue the United States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action.

Nesovic at 71 F.3d 777-778.

Nesovic was clearly an anomaly in the Ninth Circuit, as the Court had previously held that "equitable tolling was a defense to all federal statutes of limitations, unless Congress provided otherwise", *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995).[4]

The disagreement was resolved, to some degree, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)[5].

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3. *See also Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765 (4th Cir. 1991); *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991); *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980).

4. *Fadem* may have had a tortured procedural history, but the opinion quoted was the final opinion of the Ninth Circuit, *see* 113 F.3d 167 (9th Cir. 1997), and it was quoted with approval by this Court in *Calhoun County, Texas v. United States*, 132 F.3d 11001105 (5th Cir. 1998).

5. It is worth noting that the *Irwin* decision was decided on a vote of 7-2, with the dissent arguing specifically that the statutes of limitations were jurisdictional. *Irwin* at 498 U.S. 97.

This Court decided that while a waiver of sovereign immunity is not to be implied but must be unequivocally expressed, it is appropriate to consider equitable tolling as a part of the limitations period, unless Congress provides otherwise. The Court described that application of equitable tolling to statute of limitations as a "general rule" applicable to all suit against the Government, even to statutes that provide that "[E]very claim . . . shall be barred unless the petition . . . is filed . . . within six years . . ." *Irwin* at 498 U.S. 95. The doctrine of equitable tolling is simply incompatible with the idea that the limitations period is jurisdictional.

Courts have described 28 U.S.C. § 2401 as a "garden variety limitations" provision to which equitable tolling should apply. In *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999), the Court held that equitable tolling is applicable to suits under 28 U.S.C. § 2401. Since *Irwin* proscribes a "general rule", there had to be good reasons to exclude § 2401 from that rule. Section 2401 is a general limitations statute to which the general rule ought to apply, according to the *Perez* Court.

> First, Section 2401 is a garden variety limitations provision, without the attention to detail in § 6511 that suggested preemption of equitable remedies. The latter section includes four different sets of rules that the Supreme Court quoted . . . By comparison, § 2401 makes just one distinction, between the time period generally applicable and that applicable if an agency issues a final denial of the claim.
>
> Second, allowing equitable tolling would not create an administrative nightmare for the FTCA

> regime, which encompasses far fewer claims than might be filed against the Internal Revenue Service. Thus, where the principles of equitable tolling would ordinarily apply, such tolling should be allowed in an FTCA case.

Perez at 167 F.3d 917.

Based on *Irwin's* determination that equitable tolling is the appropriate "general rule" for limitations claims in favor of the government, and based on *Perez* and other cases (which specifically approve equitable tolling for claims under 28 U.S.C. § 2401), the decision that the courts below had no jurisdiction to consider the case is legally incorrect, and must be reversed.

II.

IF EQUITABLE TOLLING APPLIES, WHAT STANDARDS APPLY TO ITS APPLICATION?

The District Court found that it lacked jurisdiction to consider Caddell's claim, but grounded that determination on a finding that the suit was filed after the six-year limitations period in § 2401(a). In order to find that the suit was not timely, the District Court had to determine facts, and assess credibility. Under applicable rules of procedure, it should not make those factual findings.

In *Triplett v. Heckler*, 767 F.2d 210, 210-212 (5th Cir. 1985), a claimant filed a suit challenging a disability determination by the Social Security Administration. By statute, the claim had to be filed within 65 days of the final agency determination. The suit was actually filed 80 days after the determination. The Government moved for dismissal – arguing that the 65 day time limit was

jurisdictional. The Fifth Circuit followed prevailing authority that determined that the 65-day time limit was a statute of limitations, not a jurisdictional bar. When the statute of limitations is the basis for dismissal, Rule 12(b)(6) applies the standard for decision.[6] Rule 12(b)(1) is not applicable. In *Triplett*, the Court said:

> Although the district court applied Rule 12(b)(1), Rule 56(c) governs the standard of review in this case. The timeliness requirement of section 205(g) represents a statute of limitation rather than a bar to jurisdiction. The Secretary's motion to dismiss thus invoked Rule 12(b)(6), not Rule 12(b)(1), *see Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983) (per curiam), and the court erred in not following the procedures that Rule 12(b) requires in such a case. In particular, because the court considered material outside the pleadings in deciding the motion, "it should have converted the Rule 12(b)(6) motion for dismissal into a Rule 56 motion for summary judgment and observed the procedural requirements that Rules 12(b) and 56 prescribe."

Auster Oil & Gas v. Stream, 764 F.2d 381, 390 n.9 (5th Cir. 1985). *Triplett v. Heckler*, 767 F.2d 210, 210-212 (5th Cir. 1985).

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6. The statute of limitations may serve as a proper ground for dismissal under Federal Rule of Civil Procedure 12(b)(6), *Cross v. Lucius*, 713 F.2d 153, 156 (5th Cir.1983), but only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Abdul-Alim Amin v. Universal Life Insurance Co.*, 706 F.2d 638, 640 (5th Cir.1983). *See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983).

In this case, the Government's Motion to Dismiss could not be properly grounded on Rule 12(b)(1) because § 2401 is simply not a jurisdictional bar. *Irwin* so provides. The Government invoked Rule 12(b)(6) no matter how it Motion was denominated, and the standard for decision under that Rule applies. In fact, since the District Court considered a variety of evidence, from a variety of sources, the standards of Rule 56, Fed. R. Civ. P are most appropriate.

III.

WHAT IS THE EFFECT OF A FINDING THAT § 2401 IS JURISDICTIONAL?

A finding that § 2401 is jurisdictional has a profound effect on the applicable standard of review. If § 2401 is jurisdictional, then the trial court may make findings of fact without any further notice, and without hearing evidence. A lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

In addition, the burden of proof is impacted. The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Caddell asserts, however, that the timeliness of suit is not jurisdictional, but is a defensive issue that is dependent on the facts of the case. Therefore, the District Court is not authorized to "find" whatever jurisdictional facts support a dismissal. Instead, Caddell is entitled to procedural protections provided under Rule 12(b)(6), Fed. R. Civ. P and Rule 56 Fed. R. Civ. P. both of which were bypassed by the District Court.

The standard of review for a Motion to Dismiss under Rule 12(b)(6) is well established. In summary, a reviewing Court considers a Fed. R. Civ. P. 12(b)(6) dismissal *de novo*. Such a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *Wilting v. Progressive County Mut. Ins. Co.*, 227 F.3d 474, 475 (5th Cir. 2000). The dismissal is judged solely with reference to the pleadings of the plaintiff, and without reference to any other facts that might bear upon the claim.

> We accept a plaintiff's factual allegations as true when considering motions to dismiss under Fed. R. Civ. P. 12(b)(6). *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Unless such allegations show that the plaintiff has failed to state a claim upon which relief can be granted, this court will not grant a motion to dismiss under 12(b)(6). *Id.* This court will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts, *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992), and will construe

> all factual allegations in the light most favorable to the plaintiffs, *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994).

Spivey v. Robertson, 197 F.3d 772, 774 (5th Cir. 1999)

The issue is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support his claims. *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395, 1401-1402 (5th Cir. 1996).

It is appropriate to consider the timeliness of the filing of a complaint, and the applicability of a limitations period by a Motion to Dismiss under Rule 12(b)(6), but subject to the general rule that the issue must be resolved solely by reference to the pleadings. [where it . . . "appears from the pleadings beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."] *Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981).

IV.

HOW, THEN, SHOULD THE COURTS BELOW HAVE EVALUATED THE EVIDENCE THAT THIS SUIT WAS NOT TIMELY?

Rule 12(b)(6) contemplates that the District Court will make its decision based solely on the pleadings of the Plaintiff – measured against the governing law. The Rule does not permit the court to consider evidence or matters outside of the pleadings. In this case, however, the Court clearly considered evidence outside of the pleadings without giving Caddell notice that it intended to do so. In effect, the District Court acted as though it had either a Motion for Summary

Judgment or a concluded trial before it, and decided on those facts. The District Court should have given Caddell notice of its intention to treat the Motion to Dismiss as a Motion for Summary Judgment, and given Caddell a reasonable opportunity to respond and to provide his own evidence.

Of course, there is a method for the consideration of evidence outside the pleadings that is sanctioned by the Rules of Civil Procedure. Rule 12(b), Fed. R. Civ. P provides, in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Here, the Government clearly presented matters "outside the pleadings", and these matters were not "excluded by the court". Therefore, the District Court was obliged to give Caddell a "reasonable opportunity" to present material made pertinent to the motion. In other words, when a District Court chooses to convert a Motion to Dismiss to a Motion for Summary Judgment, it must give notice of its intent to do so, and must give the parties a reasonable opportunity to respond.

Trial courts are obliged to comply strictly with the notice and "reasonable opportunity" requirements of Rule 12(b) and Rule 56(c). *Batiste v. Burke*, 746 F.2d 257, 262 (n.2)

(5th Cir. 1984); *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977). "The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforeseeable thrust with no chance to parry."[7] *Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co.*, 373 F.2d 493 (5th Cir. 1967).

The reasonable opportunity to respond required by Rules 12(b) and 56 contemplates only that the parties recognize that the court will treat the Motion to Dismiss as a Motion for Summary Judgment. Even the Supreme Court has acknowledged that the district courts possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

But, Caddell was given no notice of the District Court's intentions. The filing of materials outside of the pleadings is not sufficient to give notice that the District Court will consider those materials in ruling on a Motion to Dismiss. Admittedly, there was "evidence" filed by both sides. But, so long as the Government was claiming that the District Court had authority to make fact findings to determine jurisdiction, Caddell was justified in presenting evidence to attempt to obtain fact findings – regardless of whether the Court was correct on the law – or was correct in applying a standard for decision.

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7. Judge Goldberg's comments about the notice requirement in *Soley v. Star & Herald Co.*, 390 F.2d 364, 369-70 (5th Cir. 1968) are equally relevant. He said, "They (the litigants) cannot read over the judge's shoulder, or penetrate his memory. Nor can we. From Shakespeare's Hamlet to Albee's Tiny Alice, soliloquies and asides have been shared with the audience."

So, the District Court's decision on the Motion to Dismiss was procedurally flawed. The District Court was presented with matters outside the pleadings, and it did not exclude them in deciding a Motion to Dismiss [as required by Rule 12(b)]. Under these circumstances, the District Court was required to notify Caddell of any intention to treat the Motion to Dismiss as a Motion for Summary Judgment so that Caddell could bring forward his best evidence in support of his claim, and so that Caddell would be fully aware of the decision pending before the District Court.

V.

WAS THERE ANY BASIS TO APPLY EQUITABLE TOLLING?

Caddell provided ample reasons for the District Court to apply an equitable tolling doctrine to his case, and expressly asked the District Court to do so. (R. 74). Caddell sought the opportunity to conduct discovery that would bear on the application of the equitable tolling doctrine and provided a sound basis upon which to permit discovery to go forward (R. 74).

Most importantly, Caddell provided concrete evidence that the Government had taken inconsistent positions both in litigation, and outside of litigation regarding its claimed lien. Contrary to the impression left by the Government's papers in this case, its position on the lien has never been consistent. Caddell owned 12 tracts of land, consisting of approximately 1545 acres. Of the 1545 acres, 400 acres were designated as homestead, and were entitled to protection from any lien such as that claimed by the United States here. The original transaction involving Caddell and the Government occurred in 1978. The first foreclosure attempt

was made in 1982. But, in 1982, the Government recognized that it did not have a lien on the "homestead property". It excluded that property from the 1982 foreclosure notices. (R. 99-106). As of 1982, the Government did not claim any lien on the 400 acres claimed as homestead (despite the existence of paperwork that the Government now claims establishes that lien).

Caddell filed a Bankruptcy case in 1982 to challenge the foreclosure that was then threatened on land other than his homestead. His Chapter 11 proceedings lasted for 5 years, and the Bankruptcy Court did decide that the Government had a valid lien under an order entered in 1987. But, even after that Order, the Government acted as though it had no lien on the homestead property.

In 1990, Caddell challenged the Government's liens in administrative proceedings. As late as 1993 and 1994, the Government was acknowledging that there was a significant issue about the validity of its liens, acknowledging Caddell's objections to the liens, and seeking a final resolution of the legal issues involved. (R. 92-98; 118-127). The Bankruptcy Court order, upon which the Government relied in this case, and which supported the District Court's ruling, was never mentioned by the Government.

The Government did not reach a final determination of Caddell's claim until even after 1996, and did not attempt to enforce its claimed lien until 2001 – when it began the non-judicial foreclosure that prompted this suit. So, there are significant periods of time when the Government's claim of a lien on Caddell's homestead is in doubt.

First, there is a period from 1978 to 1982 when there is no claim by the Government of a lien. In 1982, the Government did not claim a lien on the homestead when it sought to foreclose, but did file a proof of claim in 1984 that arguably made a claim on the homestead. The 1984 proof of claim was not resolved until 1987, when the Bankruptcy Court order came out. That would have ended things, but for the administrative proceedings that continued up through 1996 – a time during which the Government refused to rely on the Bankruptcy Court ruling, but instead sought to make an agency determination of the validity of a claim against Caddell's homestead. If the Government was not sure of its claim in 1996, then a suit filed in 2001 is clearly within the 6 year period of time allowed by § 2401.

More importantly, though, the true measure of the Government's assertion of its claim against Caddell's homestead is its foreclosure proceedings in 2001 that attempt to foreclose on that property. Caddell acted promptly to challenge that claim by filing this suit.

The equitable tolling doctrine is designed for the plaintiff who has actively pursued his remedies, and who has exercised due diligence in asserting his position, even if he is mistaken about his position, *see Perez v. United States*, 167 F.3d 913, 917-918 (5th Cir. 1999). Caddell fits that category. He challenged the United States in Bankruptcy Court, and challenged the United States in Administrative Appeals. When these were exhausted, and the Government finally sought to foreclose, Caddell went to Court to get his determination. It would have been inequitable to require him to act otherwise.

Similarly, equitable tolling is meant to limit the Government's ability to engage in misleading conduct. If the

Government should have notified a plaintiff that he was pursuing the wrong course toward resolution, then the limitations period will not run. *See Perez v. United States*, 167 F.3d 913, 917-918 (5th Cir. 1999).

Cadell fits both categories described in *Perez*. He has been diligent in asserting that the Government has no lien on his homestead, and he has followed the course of action proscribed by the Government for redress of his claims. He should not be faulted for either. If the Government and the District Court were correct in their determination, there would have been no action between the Bankruptcy Court decision and the foreclosure proceedings. Instead, over 10 years passed. That passage of time is, alone, evidence that the Government did not have the intention to pursue a claim against Caddell's homestead. The only undisputed conduct that supports the Government's claim of a lien on Caddell's homestead is the non-judicial foreclosure that began in September of 2001, and which was immediately challenged by Caddell.

For these reasons, there was ample evidence from which a fact finder could conclude that equitable tolling should have applied.

VI.

CADDELL HAD NO CLAIM FOR RELIEF UNTIL THE FORECLOSURE PROCEEDINGS.

In reality, Caddell had no claim for relief that he could have filed until the foreclosure proceedings commenced in 2001. The Government claims the benefit of a Bankruptcy Court decision in 1987 – one that it permitted to languish for over 14 years before it attempted enforcement. If any one in this case is guilty of sleeping on their rights, it is the Government. For if one considers that Bankruptcy Court decision to be critical, it was Caddell who acted diligently to understand its application. He participated in agency administered proceedings from 1987 to 1996 seeking clarification of the Government's position. It was during this time that the Government indicated genuine doubt as to the extent of its lien, and the propriety of any past decisions. As of 1996, the Government was seeking advice or independent determinations of its position. So far as anyone knows, Caddell received no information from 1996 to 2001 about the Government's claims against his homestead. Yet, in 2001, when the Government started to foreclose, Caddell did the only thing that he was permitted to do – sue the Government within the time period permitted by law.

So, the District Court's determination that prior orders or rulings were determinative of Caddell's rights simply ignores critical facts from the date of the order (1987) to the date of the foreclosure proceedings (2001). It was not until 2001 that Caddell or the Government had an open dispute about their positions, and Caddell acted as soon as that dispute was apparent.

CONCLUSION

For the reasons stated, the judgment of the District Court incorrectly dismissed Caddell's claims. The statute of limitations is not a jurisdictional requirement for the District Court, but a defense that the Government had the burden to establish. It could not do so simply by providing affidavits or declarations. Instead, the Government had to follow the rules of procedure. And the District Court had to evaluate the claim in light of those rules. Here, the rules were ignored to reach a particular result, and that action requires reversal and remand for a new trial.

Respectfully submitted,

STEVEN GREGORY WHITE
MCGREGOR & WHITE
P.O. Box 1818
Waco, Texas 76705
(254) 756-4427

Attorneys for Petitioner